IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARVIN LUSTIGER, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	No. 20967

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

SUBJECT INDEX

CITATIONS

CASES

UNITED STATES CONSTITUTION

STATUTES

RULES AND REGULATIONS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN LUSTIGER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 20967

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

I.
JURISDICTIONAL STATEMENT OF FACTS

On October 25, 1963 an Indictment was returned by the Federal Grand Jury sitting in Phoenix, Arizona, charging the appellant with nineteen (19) counts in violation of 18 U.S.C. §1341 (mail fraud). Each count charged the defendant with mailing a different individual material in furtherance of the

scheme to defraud. Transcript of the Record Vol. I, page 2. (Hereinafter Vol. I of the Transcript of Record will be referred to as "RC," the number following will refer to the page. Vol. II through V of the Transcript of Record i.e. the Reporter's transcript, will be referred to as "RT," the number following will refer to the page, and the number following letter "L" will refer to the line. The appellant will be referred to as Marvin Lustiger).

The Indictment was filed in the Phoenix Division of the United States District Court for the District of Arizona on October 25, 1963 (RC 325). The Court issued a Summons to the appellant, returnable on November 18, 1963, and set the appellant's bail in the sum of $3,000; on October 28, 1963 Mr. Jack Madden, Phoenix, Arizona, filed an appearance for the appellant, and at that time the Court ordered that all records, papers, documents and exhibits produced by the appellant at the Grand Jury proceedings released to counsel for the defendant and made available to the Government (RC 325).

After two requests for delay the appellant was arraigned on February 4, 1964 and the appellant pleaded not guilty to all counts of the Indictment, and a Motion for change of venue was made by the appellant (RC 326).

On May 8, 1964, the case was set for trial on November 18, 1964, but on August 24, 1964 by stipulation, the trial date was vacated (RC 326).

On September 15, 1964, the appellant filed a Motion to transfer the case to Tucson Division for hearing (RC 326). On January 29, 1965 the Court, after hearing arguments on both sides, ordered the transfer of the case to the Tucson Division (RC 326).

On March 1, 1965 the appellant filed (1) a Motion to Dismiss the Indictment, or, alternatively, a Motion for Disclosure of Minutes of the Grand Jury and Motion to Dismiss the Indictment on the Basis of Disclosure and a Memorandum of Law and Notice; (2) a Motion to Dismiss for Lack of Jurisdiction, For Inadequacy of Evidence Before the Grand Jury to Sustain the Indictment, and in the Alternative, on the Grounds that 18 U.S.C.A. §1341 and the Indictment are Unconstitutional if the Indictment States an Offense Against the United States under 18 U.S.C.A. §1341, and a Memorandum of Authorities; (3) a Motion to Dismiss on the Grounds Each Count Fails to State an Offense Against the United States and Each Count is Duplicitous and a Memorandum of Authorities; (4) a Motion for Discovery and Inspection of Documents and To Take the Deposition of Doyle C. Marshall in Order to Afford Defendant with Due Process Under the United States Constitution, and Memorandum of Authorities and Notice; (5) Motion for Discovery and Inspection Under Rule 16, F.R.Cr. P. and Memorandum and Notice; (6) a Motion for Suppression of Evidence and Memorandum and Notice; (7) a Motion for a Bill of Particulars and Memorandum of Authorities and Notice, and (8) Affidavit Supporting Defendant's Motions (RC 326-327 see also RC 30 thru 95 and exhibits at 96-193).

On March 1, 1965, the Court set March 20, 1965 as the date of hearing for the Motions of Marvin Lustiger and set the date for trial as June 8, 1965 (RC 327).

On March 17, 1965 the Government filed one Memorandum in Opposition to the Motions (RC 327).

On March 20, 1965 after hearing argument by both sides, the Court *denied* the first three Motions and the sixth Motion,

(RC 327). The fourth, fifth and seventh Motions were taken under advisement (RC 327).

On March 20, 1965 Marvin Lustiger filed a Waiver of Trial by Jury (RC 327).

On April 3, 1965 the first pre-trial was held (RC 327). The first twenty exhibits of the Government were marked, but no reporter or clerk was present. (Lustiger filed a written waiver of his presence at all pre-trial conferences RC 197.)

On April 15, 1965 the Court denied the three remaining Motions which had been taken under advisement; "Provided, however, that to the extent that the Motions are based on *Brady v. Marpland,* insofar as they concern matters relating to punishment are postponed for a decision until after the ruling on guilt or innocence in the case; and insofar as the motions relate to matters concerning the defendant's guilt or innocence, the same may be renewed by defendant at the close of the government's case. If the motions are renewed at the close of the government's case, the Court will make an in camera inspection of the United States Attorney's file and all statements of witnesses. The Court will return to the United States Attorney all work product material, exhibit to defendant and his attorney all matters, which in the Court's opinion, would bear on the question of defendants' guilt or innocence, and will order the balance of the file sealed and delivered to the Clerk so that it may accompany the record on appeal, if any. The United States Attorney is granted permission to substitute photostatic copies for material examined in camera and have returned to him the original material" (RC 327-328).

On April 29, 1965 the second pre-trial hearing was held and Stipulations 1 and 2 were filed at that time; certain num-

bered exhibits were marked in evidence, pusuant to the Stipulations (RC 328).

The third pre-trial conference was held on May 14, 1965 and Stipulations 3 and 4 were filed, and on June 2, 1965 were approved by Marvin Lustiger (RC 328). Stipulations 5, 6, 7 and 8 were filed on June 4, 1965 and approved by appellant on June 7, 1965 (RC 328). On June 7, 1965 Stipulations 9 and 10 were filed by the United States and approved by appellant on the same date (RC 328).

The trial was held at Tucson, Arizona on June 8, 9 and 10, 1965 (RC 328-329).

On June 10, 1965 Counts IX and X of the Indictment were dismissed on motion of the Assistant U. S. Attorney and the Motion of the appellant for judgment of acquittal was denied by the Court (RC 329).

On June 11 and 15, 1965, Marvin Lustiger offered evidence and on June 15, 1965 a Waiver of special findings of fact was filed (RC 329).

On June 16, 1965 the case was argued before the Court. The Court found the appellant guilty as charged in Counts I through VIII, and XI through XIX, and fixed the time for passing judgment on August 2, 1965, and, the Court granted Lustiger to and until July 16, 1965 to file motion for new trial, motion in arrest of judgment or such other post-verdict motion he desired (RC 329).

On June 28, 1965 the Court entered judgment and fined the appellant $1,000 on each count of I through VIII and XI through XVIII; imposition of sentence suspended on Count XIX for six months on condition that fines imposed on Counts I through VIII, and XI through XVIII are paid within 90 days from June 28, 1965 (RC 329).

On June 28, 1965 a $14,000 check was added to appellant's $3,000 bail check to serve as bond pending appeal and it was stipulated that should the judgment be formally approved on appeal, the total sum of $17,000 would be applied by the Clerk to the payment of the fines imposed, and if reversed the sum of $17,000 would be returned to Marvin Lustiger (RC 329).

On July 7, 1965 Marvin Lustiger filed Motion for Judgment of Acquittal; Motion for New Trial, and Motion for Arrest of Judgment (RC 329). On July 9, 1965 the Court entered an Order giving Marvin Lustiger 40 days after receipt of the reporter's transcript to file memoranda, the Government to have up to 40 days following receipt of Lustiger's memoranda and Lustiger to have 20 days to file a reply (RC 329). On October 1, 1965 Lustiger filed a Memorandum in Support of Motion for Judgment of Acquittal and Motion for New Trial (RC 329). After being granted an extension of time, the Government filed its Memorandum on October 25, 1965 (RC 330). On November 15, 1965 Lustiger filed his Reply Memorandum (RC 330). On January 4, 1966 the Court set the Motions of Lustiger for hearing on January 17, 1966 (RC 330). On January 17, 1966, the Motions were heard by the Court with Lustiger present in person and by counsel, and the Motions were denied (RT V 4, 18, L 10-12 and RC 330).

On January 24, 1966 the appellant filed a Notice of Appeal (RC 330).

Lustiger's counsel was granted an extension of time to file record on appeal to April 24, 1966, and on April 21, 1966 the record was transmitted to this Court (RC 330).

On September 9, 1966 substitution of attorney Burton Marks for Jack Madden was made by Marvin Lustiger.

On September 27, 1966 Lustiger filed a Motion to Remand and on October 24, 1966 this Court entered an order denying the Motion without prejudice and further that if after filing a Motion for New Trial in the District Court and that Court files a statement it wishes to hear it, appellant may renew the motion there. On January 6, 1967 Lustiger filed in the U. S. Disrict Court for the District of Arizona his Motion for New Trial based on Newly Discovered Evidence that his trial counsel was incompetent. On January 9, 1967 Judge James A. Walsh filed a statement "the Court now states it does not wish to hear the Motion".

On January 31, 1967 the appellant filed a Motion for Remand in the District Court for purpose of presenting a Motion for a new trial or in the alternative a Motion for reference to take additional evidence. At the same time the appellant requested an extension of time to file the opening brief within 60 days after a ruling by the 9th Circuit Court of Appeals on the Motion to Remand. On February 23, 1967 the 9th Circuit Court of Appeals denied the Motion and allowed the appellant 30 days time to file the opening brief on appeal.

On March 20, 1967, the appellant requested time until May 1, 1967 to file the opening brief. This request was approved on March 24, 1967 by the Court.

On March 21, 1967 the appellant filed a Motion with the Supreme Court of the United States for an order directing the Court of Appeals for the 9th Circuit to abate the appeal and remand the matter to the trial court for the purpose of hearing a motion for a new trial on the grounds of newly discovered evidence. The Court through Justice Douglas denied the Motion on April 13, 1967.

This appeal is under the provisions of 28 U.S.C.A. §1291.

II.

STATEMENT OF FACTS

Marvin Lustiger caused the formation of The Lake Mead Land and Water Company (hereinafter LMLWC) on September 7, 1960 (Stipulation I, para 1-6). He and his family owned all of its stock, and Lustiger alone was responsible for the policy making and management of the company (RT 359, RT 370).

LMLWC controlled (either owned or had options to purchase) approximately 64 sections of land in Mohave County, Arizona, (Govt. Ex. 23, 24), for which it paid an average of $40 an acre (RT 368). It subdivided 20 of these sections, consisting of 9844 acres and 6548 parcels, and offered all or part of 11 of these sections, consisting of 6400 acres subdivided into 4247 parcels, to the public for sale (Ex. 27). (Only 20 had been subdivided as shown on Ex. 27). By March 10, 1962, approximately 3,000 lots had been sold with 200 having been paid for in full (RT 361).

The entire sales operation of Lake Mead was conducted by the use of the United States mail (Exhibit 58, Stipulated Fact No. 10). Lustiger organized Arizona Associated Advertising Agency, a "house agency," to handle the advertising for said corporation (Exhibit 58, Stipulated Fact No. 13). The Lake Mead Company, through the Appellant, informed all mail customers that mail should be sent to the Company at P.O. Box 13349, Phoenix, Arizona. The appellant used this Post Office box as a point from which the mail was forwarded to him at Azusa, California by a part-time employee (RT 79-80—362, Ex. 61-62). After receipt, the appellant processed the mail through the National Land Company (owned by the appellant) and returned it to Phoenix by bus where the part-time employee placed the correspondence in the mail

so that the return post mark was consistent with the mailing address previously given to the customers (RT 81-82, 363). At no time did LMLWC, or appellant, notify customers that LMLWC did not, in fact, have a working office in Phoenix. All checks were cashed in a Phoenix bank so that they would show an Arizona cancellation (RT 82).

To induce sales, Lustiger caused the LMLWC to advertise its property in newspapers and other publications throughout the country, asking that replies be sent to the post office box in Phoenix (RT 362 L 15-18 and Exh. 29 thru 36a). Those who answered were sent an extensive brochure (Exh. 37 series) and vicinity map (Exh. 38 series) and letter (Exh. 40 thru 40i) (RT 362 L 19). If a reservation form was then returned to P.O. Box 13349 with a $10 deposit, the appellant caused the LMLWC to send the customer a plat map on which the lot being purchased was marked, together with a contract for execution (RT 362 L 23-25 to 363).

The advertising brochure which Lustiger had LMLWC distribute, entitled "Join Us for Pleasure and Profit at Lake Mead City," (Govt. Ex. 37a thru 37f) made numerous representations about the virtues of "Lake Mead City." Thus, the city was described as "Arizona's best located planned community," (Govt. Ex. 37a-37f p. 4), situated "less than 5 miles from the Lake," (Govt. Ex. 37a-37f, p. 17), "within a beautiful Joshua Tree Forest, and, in the heart of the Lake Mead National Recreational Area." (Govt. Ex. 37a-37f, p. 9). It was said to be "one of the best planned and fastest selling resort areas in Arizona" (Govt. Ex. 37a-37f, p. 3). The brochure stated, furthermore, that "county roads have existed in Lake Mead City for several years, and are maintained in proper condition at all times." (Govt. Ex. 37 a,b,c, p. 8), and that "all road easements are provided to assure [the buyer] of access" (Govt. Ex. 37a-37f, p. 30). Lake Mead City was

described as being "easily reached, with access via U.S. Highways and County Roads," (Govt. Ex. 37a-37f, p. 16), and modern schools, churches, and shopping facilities were located in "nearby Kingman, the county seat, and the largest city in northwest Arizona" (Govt. Ex. 37a-37b, p. 5).

In addition to such verbal descriptions, the brochure relied on photographs. Thus the statement "Important! Plenty of Water" (Govt. Ex. 37a-37f, p. 21) was juxtaposed with photos showing substantial bodies of water. Other photos showed a "Favorite swimming hole" and a "comfortable ranch house," (Govt. Ex. 37a-37f, p. 25) "within the boundaries of Lake Mead City" (Govt. Ex. 37 d, e, f, p. 25). In short, the brochure did indeed convey the impression that the land was among "the finest ever offered for sale in the State of Arizona" (Govt. Ex. 37a-37b, p. 5).

The facts, however, were very different. LMLWC subsequently admitted that its land was totally undeveloped and "was not suitable in its present state for homebuilding" (Govt. Ex. 50, p. 1). Only four houses had been built in Lake Mead City (RT 404), and much of the land was rocky, hilly, and cut by very deep washes (RT 379-80). Lake Mead City land was available, moreover, only in a checkerboard pattern because the Federal government owned the even numbered sections (Govt. Ex. 50, p. 3; Govt. Ex. 58, Stipulated Fact 17). A cliff approximately 1,000 feet high traversed the land (RT 388). Several of the parcels which had sold could not be reached by use of ordinary motor vehicles, and others could not be reached even with a Scout 4-wheel drive vehicle (RT 375-38).

The "planning" of Lake Mead City consisted of little other than designation of contiguous rectangular residential parcels and adjoining rectangular "commercial areas" (Govt.

Ex. 28). Only one of the 20 subdivided units had graded streets (RT 378), and LMLWC ultimately admitted that it could not guarantee the economic feasibility of construction of access roads to the parcels (Govt. Ex. 50 p. 4).

Similarly, domestic water was not available, as a practical matter, on any of the land. Residents would have had to buy delivered water or obtain it from a well on the Diamond Bar Ranch, and, if the land was developed, Lake Mead City might well have faced a water shortage (Govt. Ex. 50 p. 2-3), The Clearwater well was the only source of water controlled (i.e. under option) by the Lake Mead Company (RT 298, 361). Moreover, the photos of bodies of water included on page 21 of the brochure (Govt. Ex. 37) were taken not of Lake Mead City property, but rather at the Diamond Bar Ranch (RT, 255-56). The "Favorite Swimming Hole" photo at p. 25 of the brochure similarly was taken at Diamond Bar Ranch (RT 258), and its foreman testified that it was not a swimming hole but rather was a dirt stock tank for stock water with perhaps 2 feet of mud on its bottom (RT 270-71).

In regard to the location the project, although the nearest section of Lake Mead City was approximately 5 miles from the Lake as the crow flies, (Govt. Ex. 50, p. 4), it was 15 to 40 miles from the Lake by road (RT 393). The nearest electrical power line, furthermore, was approximately 23 miles from Lake Mead City (RT 393), and Kingman, population approximately 6,000, (Govt. Ex. 50, p. 2), was about 60 miles away (RT 393).

Despite these facts, sales through the extensive advertising program continued until May of 1962 at which time the advertising program was discontinued when litigation over use of range rights was unfavorable (RT 366-67. By March 10, 1962, 3000 lots had been sold (RT 361). The Govern-

ment offered the testimony of the following witnesses who relied on the brochure, Exhibit 37 Series: Mr. Reed (RT 87); Mr. D'Amico (RT 96-97); Mr. Corley (RT 101); Mr. Bland (RT 107); Mr. Feldman (RT 113 and 115); Mr. Rodler (RT 137-138); Mrs. Bender (RT 150); Mr. Ball (RT 165); Mr. Bean (RT 178); Mr. Binkley (RT 184); Mr. Leonard (RT 208); Mr. Oldfield (RT 227-228; 232-233); Mrs. Johnston (RT 238). (Mr. and Mrs. Johnston never purchased land, but received the brochures, etc., tried to get to the land and wouldn't buy after that); Mr. Mecchi (RT 245). Some of the customer witnesses for the defense had not even seen their lots, only the area, Col. Davidson (RT 436, L 22-23); the next one, Mrs. Hummel, bought a house from Mrs. Garret Haynes, not a lot through the mail (RT 498, L 21, thru 449, L 7); the next one, Howard F. Sweeney, saw the area (RT 549, L 4-8); the next one, in 1964, Betty Russell, went to the Information office, never looked at the land she purchased, and traded lots (RT 557, L 17, thru RT 559, L 2); nor did Thomas Lincoln look at the lot, only the area (RT 577, L 23-25, RT 578, L 15-16, and RT 579, L 25, to 580, L 3); Etta Mitchel lived at the Information office and who had originally purchased a lot, never went to see the lot (RT 584, L 19-24), until a year after she moved to the Information office; Otis McDonald did not get close to his land (RT 610, L 8-10); the last one, Delmar J. Meyers, purchased in the building area, Section 23, and saw his lot before he purchased it (RT 616, L 18-20).

III.

OPPOSITION TO SPECIFICATION OF ERRORS RELIED ON

1. The evidence introduced into evidence was legally obtained, and the Mail Cover was not illegal and was not in violation of Appelant's rights as guaranteed by the Constitution.

2. The Motion to Dismiss Indictment, Or Alternatively for Disclosure of the Minutes of the Grand Jury, and Motion to Dismiss Indictment on the Basis of the Disclosure, were properly denied.

3. The Motion to Dismiss the Indictment was properly denied since the Indictment did state an offense and 18 U.S.C., §1341 is not unconstitutional.

4. The Motion to Dismiss the Indictment was properly denied since each count stated an offense and each count was not duplicitous.

5. The Court did not commit prejudicial error in its denial of a Motion for a Bill of Particulars and in the Order permitting Appellant to raise the Motion for Discovery at the close of the Government's case and in any pre-sentence investigation to be had should there be a conviction.

6. The Indictment was valid and did not violate the First Amendment rights of the Appellant.

7. The Court did not commit prejudicial error in finding from the entire evidence sufficient evidence to convict, and, further, there is an ascertainable standard of guilt, and, further, proof of someone being defrauded is not an element of the offense.

8. There was no prejudicial error by the Court in sustaining the Government's objection to James M. Smith's opinion as to the value of the land, and the Government's objection to the advertising of adjacent land promotions and land promotions in other states, and the Government's objection to the former President of the Arizona League of Land Developer's opinion of Lustiger's advertising, and, further, there was no error in the admission of Exhibit 42 offered by the Government.

9. Lustiger was not denied effective representation of counsel at trial.

IV.
SUMMARY OF ARGUMENT

1. Evidence procured as a result of a Mail Cover where there has been no delay of the mails is not illegally obtained evidence.

2. There were not sufficient grounds shown by Appellant for the disclosure of the Grand Jury Minutes and therefore the Motion to Dismiss and the Motion for Disclosure were properly denied.

3. The Indictment does state an offense for violations of 18 U.S.C., §1341, and 18 U.S.C., §1341 is constitutional.

4. The Indictment did not contain duplicitous Counts.

5. The *Brady v. Maryland* Motion was not denied and the Trial Court did not abuse its discretion in denying the Motion for a Bill of Particulars.

6. The charges in the Indictment do not violate Appellant's First Amendment right to free speech.

7. There was sufficient evidence to find Appellant guilty beyond a reasonable doubt, there being an ascertainable standard of guilt under the offense charged, and proof of someone being defrauded is not an element of the offense.

8. The testimony of rancher James M. Smith's opinion as to the value of the land was not material, nor was the evidence of the advertising of adjacent land developments material, much less the advertising of land developments in other states, nor was the opinion of the former President of the Arizona League of Land Developers of the advertising of the Appellant admissible, nor was there error in admitting Government's Exhibit 42.

9. Appellant was afforded effective assistance of counsel at trial.

V.
ARGUMENT

1. Evidence procured as a result of a Mail Cover where there has been no delay of the mails is not illegally obtained evidence.

Lustiger, in a pre-trial motion (RC 72 et seq) and supported by paragraph 7 of the Affidavit of his trial counsel (RC 85 at 88-89), moved to suppress all the evidence of the Government on the grounds the evidence was the result of an illegal "mail watch" which violated Lustiger's rights under the Fourth Amendment. Paragraph 7 of the Affidavit of Lustiger's trial counsel was:

> "7. Upon information and belief (based upon the belief that a 'mail watch' was the only source from which said Marshall, on and prior to January 22, 1963, could

secure such information), said Marshall procured the addresses of the customers to whom he sent Exhibit J by means of a 'mail watch' whereby and whereunder by physically taking possession of the mail being sent by customers to Lake Mead at its Phoenix, Arizona, post office box, he copied or caused to be copied the names and addresses of Lake Mead's customers. Upon information and belief, all evidence which said Marshall procured from said customers was therefore derived and springs from said 'mail watch'."

The Government in its Memorandum in Opposition alleged that Lustiger assumed there was a delay. At the hearing of the Motion on March 20, 1965, a reporter was present; however, the transcript is not a part of the record. The Postal Inspector Doyle Marshal was present as well as Lustiger at the hearing. The Government's attorney asserted there was no delay of the mail, and that the instructions to the postal employees were to record as many of the addressees' return addresses as would not delay the mail. This was conceded by Lustiger's counsel that there was no delay. The thrust of his argument was that the mere recording of the addressee's name and address was an illegal search and seizure.

Appellant in his brief at page 49 cites some of the cases cited by trial counsel, and cites in addition *Griswold v. Conneticut,* (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, which was not cited by trial counsel. This case deals with the reversal of a conviction under a Connecticut statute prescribing the *use* of contraceptives. The reversal was based on the violation by the Connecticut statute of the right of privacy of married people. It is respectfully submitted that the *Griswold* ruling has no application.

In the brief are cited the following cases, which hold:

Weeks v. United States, (1914) 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, which held the Government cannot retain for evidence, letters and correspondence of the accused seized in the house of the accused, in the absence of the accused and without the authority of the accused by a United States Marshal who did not have a warrant for arrest or for search.

Boyd v. United States, (1886) 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, which held unconstitutional the fifth section of the Act of June 22, 1874, the Customs Revenue Law, which section authorized the United States Attorney to get a Court Order directing a respondent in a forfeiture proceeding to produce invoices and if the respondent does not, the allegations of the United States Attorney as to what they will prove will be taken as confessed. The Supreme Court held the section to be in violation of the Fifth Amendment (compelling a person to testify against himself), and of the Fourth Amendment (unreasonable search and seizure). (The trial memorandum (RC 72) cited *Weeks* and *Boyd* for the proposition that the Fourth Amendment prevents unlawful searches and seizures.)

In the Matter of Jackson, (1877) 96 U.S. 727, 24 L.Ed. 877, 23 Wall. 877, which denied petitioner's application for reversal of his conviction for sending lottery matter through the mail on the grounds that the record did not show the pamphlets were sealed or unsealed. The Supreme Court recognized First Class Mail Matter was protected by the Fourth Amendment, which is the prosposition for which it was cited by Lustiger's trial counsel (RC 73-74).

Oliver v. United States, (8th Cir., 1957), 239 F.2d 818, which held that First Class Mail cannot be opened and searched. The Court held the opening of Air Mail which had been sent from Kansas City, Missouri, to Denver, Colorado, and which contained one and three-fourths ounces of heroin was a viola-

tion of the Fourth Amendment. Trial counsel cited this for the same proposition, i.e., First Class Mail is protected against illegal search and seizure (RC 74).

Appellant in his brief at page 49 asserts that the Mail Cover was in violation of 18 U.S.C., §1703, and 39 CFR, §3.1, as did Lustiger's trial counsel (RC 73).

Lustiger and his trial counsel, at the original hearing on March 20, 1965, did not contest the assertion of the Government that there was no delay of the mail, nor *did he assert delay in the Affidavit.*

In *United States v. Costello,* (2nd Cir., 1958), 255 F.2d 876 at page 882; *United States v. Schwartz,* (Pa. 1959), 176 F.Supp. 613, Aff. (3rd Cir., 1960), 283 F.2d 107 at page 110; *Canaday v. United States,* (8th Cir., 1966), 354 F.2d 849 at 856; and *United States v. Coplon,* (S.D. N.Y., 1950), 88 F.Supp. 921, reversed on other grounds (2nd Cir., 1950), 185 F.2d 629, mail covers have been upheld.

It is respectfully submitted a mail cover, without delay, does not constitute an unreasonable search and seizure.

2. There were not sufficient grounds shown by Appellant for the disclasure of the Grand Jury Minutes, and therefore the Motion to Dismiss and the Motion for Disclosure were properly denied.

It is asserted by Appellant in his brief at page 49 that the pre-trial motion of Lustiger by his trial counsel (RC 30) for dismissal, or in the alternative disclosure of the minutes of the Grand Jury should have been made and cites the affidavit of trial counsel (RC 33-35) in the brief in support of his position. Appellant in the brief also cites all three cases

cited by trial counsel in the Memorandum filed in support of the Motion (RC 32).

They held as follows:

Abbott v. Superior Court of Pima County, (Ariz., 1959) 86 Ariz. 309, 345 P.2d 776, held that the Indictment returned by a state grand jury must be quashed where there was no quorum of the grand jury during the investigative portion *and* on the day they voted to return a true bill.

United States ex rel McCann v. Thompson, 2nd Cir., 1944), 144 F.2d 604, cert. den. 323 U.S. 790, 65 S.Ct. 313, 89 L.Ed. 630, which held that qualified grand jurors not present during all the evidence may vote (trial counsel cited this case as contra to his position).

United States v. Armour, (S.D. Calif., 1963), 214 F.Supp. 123, which held that grand jurors voting in an antitrust case do not have to be present at all the testimony.

In *United States ex rel McCann v. Thompson,* supra, at page 607, it was stated:

> ". . . Since all the evidence adduced before a grand jury—certainly when the accused does not appear—is aimed at proving guilt, the absence of some jurors during some part of the hearings will ordinarily merely weaken the prosecution's case. If what the absentees actually hear is enough to satisfy them, there would seem to be no reason why they should not vote. Against this we can think of nothing except the possibility that some of the evidence adduced by the prosecution might conceivably turn out to be favorable to the accused; and that, if the absentees had heard it, they might have refused to vote a true bill. No one can be entirely sure that this can never occur;

but it appears to us so remote a chance that it should be left to those instances in which it can be made to appear that the evidence not heard was of that character, in spite of the extreme difficulty of ever proving what was the evidence before a grand jury. Indeed, the possibility that not all who vote will hear all the evidence, is a reasonable inference from the fact that sixteen is a quorum. Were the law as the relator argues, it would practically mean that all jurors present at the beginning of any case, must remain to the end, for it will always be impossible to tell in advance whether twelve will eventually vote a true bill, and if they do, who those twelve will be. The result of such a doctrine would therefore be that in a long case, or in a case where there are intervals in the taking of evidence, the privilege of absence would not exist. That would certainly be an innovation, for the contrary practice has, so far as we are aware, been universal; and it would be an onerous and unnecessary innovation . . ."

There were sixteen grand jurors who attended both sessions (17 at the first two days and 20 at the second two days). To speculate that of these sixteen, much less the twenty, grand jurors there were not twelve grand jurors who did not have sufficient evidence upon which to return an Indictment is to presume grand jurors do not follow their oath.

It is respectfully submitted there was no real basis for the disclosure, and the Motion was properly denied.

3. The Indictment does not state an offense for violations of 18 U.S.C., §1341, and 18 U.S.C., 1341 is constitutional.

Appellant, in the brief at pages 50 through 53, asserts the same grounds as were asserted by the trial counsel of Appellant

in the pre-trial Motion to Dismiss for Lack of Jurisdiction; for Inadequacy of Evidence Before the Grand Jury to Sustain the Indictment; and in the Alternative that 18 U.S.C., §1341 and the Indictment are Unconstitutional, etc. (RC 36), and all of the cases cited by Appellant in the brief at pages 50 through 53 were cited by trial counsel (with the exception of *Giaccio v. Penn.,* (1966) 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 477), but not to the same purpose.

Cited for the proposition that the Indictment was defective as a matter of law in that it did not contain the elements of the offense charged; it did not sufficiently apprise the Appellant of what he had to be prepared to meet; it was not sufficiently definitive in its terms to pinpoint with accuracy the extent to which a defendant may plead a formal acquittal of (sic) conviction; and it did not set out the offense with sufficient specificity as to inform the Court of the facts alleged, so that it might decide whether they are sufficient in law to support a conviction (Opening Brief of Appellant, pages 50-51), is *Russell v. United States,* (1962) 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240. The *Russell* case involved the failureof a witness before a Congressional Committee to answer questions. The Indictment did not allege the subject of inquiry of the Committee so that the pertinency of the questions the witness failed to answer could not be tested.

At pages 763-764 the Supreme Court emphasized two protections an Indictment is intended to guarantee:

> "These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet,' " and secondly, " 'in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' "

The Indictment in this case alleges the Appellant devised and intended to devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises from numerous persons (RC 1 lines 13-16). The Indictment, in paragraphs 2 through 6, alleges the steps he took in furtherance of the scheme (RC 3-5, line 27). The Indictment sets out in paragraph 7 the misleading, deceptive, false and fraudulent pretenses, representations and promises contained in the brochure "Join Us for Pleasure and Profit at Lake Mead City, Arizona" (Government's Exhibit 37 Series), (RC 6 thru 9, Line 6). Paragraph 8 alleges Lustiger misled and deceived the persons intended to be defrauded into believing that houses already existed in Lake Mead City and that water for drinking, boating, waterskiing, fishing and swimming sports was abundant, by means of photographs and misleading and false statements concerning those photographs appearing in said brochures (Government's Exhibit 37 Series), and by means of vicinity maps (Government's Exhibit 38 Series), and then sets them out with particularity (RC 10 thru 11, line 23). Paragraph 9 alleges Lustiger sent out plat maps (Government's Exhibit 28 Series) with a memorandum stating special care had been taken to select a lot or lots in the choicest area (RC 11). Paragraph 10 alleges Lustiger represented, by means of special price lists, special offering circulars (Government's Exhibit 40 Series), stating that only a few lots were left in the choice areas and that prices were rising and that they would never be able to purchase lots at such low prices again, whereas Lustiger well knew the prices were arbitrarily being raised (RC 12). Paragraph 11 alleges Lustiger wilfully and knowingly concealed facts which would affect the use of lots for residences; that Lake Mead City was scattered in five different townships and in each township the even numbered sections were reserved by the Government for grazing purposes; many of the sections contained rocky hills and unbridged natural drainage washes;

only a few sections were adjacent to existing county roads, and many sections were not accessible by ordinary passenger vehicles; some of the sections were separated from the other sections by a high mountain and deep natural washes; the nearest section to existing electric power and telephone lines was twenty-three miles, and the farthest was thirty-eight miles; most of the sections did not have streets for access to lots, the nearest section by existing motor vehicle roads or trails to Lake Mead was fifteen miles and the farthest was forty miles; and some of the sections were twenty-eight miles distant by existing road and jeep trails to the only assured source of drinking water (RC 12-14, line 4). The twelfth paragraph of Count I, and the last paragraph of the remaining Counts, allege that Lustiger caused a mailing to a particular person in furtherance of the scheme (Government's Exhibits 1 through 19).

In *John Dolack v. United States,* (9th Cir., April 7, 1967), No. 21,256, at page 7 of the slip sheet opinion, this Court quoted with favor from *Rivera v. United States,* (9th Cir., 1963), 318 F.2d 606, as follows:

> " 'The Indictment alleged the offense substantially in the words of the statute which sets forth all the essential elements of the crime; . . . the indictment thus alleged an offense and identified the particular conduct upon which the charge was based to the extent necessary to protect appellant from double jeopardy and to tell him what he must be prepared to meet. This was enough to satisfy constitutional standards. . . .' "

Compare the Information in *Dolack v. United States,* supra, footnote 2, and the Indictment in this case (RC 2).

It is respectfully submitted the Indictment meets the test set out in the *Russell* case.

Cited for the proposition that the great bulk of allegedly fraudulent statements were seller's talk and which held as follows:

Harrison v. United States, (6th Cir., 1912), 200 F. 662 (cited as 200 F.2d in Appellant's brief at page 51, but cited by his trial counsel correctly at RC 38, Line 14), which held that puffing within any reasonable grounds is not fraudulent within the meaning of the mail fraud statute, but at page 666 the Sixth Circuit stated:

> ". . . fall in this same class, because, though the representation affects quality or performance, it directly pertains to a fact plain or inherent in the substantial identity —the essential characteristics—of the thing itself; and even though the original and underlying business is legitimate, the use being made of it is fraudulent."

The defendant sold "New Home Vacuum Cleaners" and "Easy Way Washers." The judgment was reversed, however, because the confession of the defendant admitted into evidence was wrongfully obtained.

United States v. Rabinowitz, (6th Cir., 1964), 327 F.2d 62, which was a charge of mail fraud involving the sale of knitting machines, but as the Court pointed out at page 80, although the initial contacts were made through the mail, the knitting machines were sold only after the buyers saw them demonstrated and were able to observe them in operation, and therefore the statements made by salesmen were clearly sales talk.

It is respectfully submitted that as alleged in Paragraph 10 in the Indictment (RC 12), Lustiger sent out circulars stating there were special offerings at special prices, urging the persons intended to be defrauded to buy now through the mail.

Cited for the proposition that the concealments or omissions in advertising attributed to the Appellant were not "criminal" since the Appellant was charged in some cases with not "clearly revealing" facts, are the following cases which held:

United States v. Kram, (3rd Cir., 1957), 247 F.2d 830, which held that if the Indictment charges that the solicitation was intentionally drawn to be misleading then the Government must prove it. The Court reversed the conviction on failure of proof. (The Third Circuit at page 832 holds that ordinarily there are only two elements—the intentional devising of a scheme to defraud and the use of the mails in carrying out that scheme).

United States v. McNamara, (2nd Cir., 1937), 91 F.2d 986, which reversed the conviction because the Second Circuit held the use made of the evidence of transactions at the end of the year to salvage the company and the closing argument of Government's counsel were highly prejudicial. The Court refused to consider whether concealed facts were properly submitted to the jury (p. 992).

Stubbs v. United States, (9th Cir., 1918), 249 Fed. 571, which held that an alleged scheme to defraud in exchanging property was not mail fraud since the alleged victim was told that she was not purchasing from the real buyer, and further, that it was not fraudulent for Stubbs not to reveal to her the real reason he recorded the contract, and that reason was to compel her to buy since he was compelled to buy.

Charles v. United States, (4th Cir., 1914), 213 F. 707, (cited by trial counsel at RC 41 line 15 to show where concealment type of misrepresentations have been upheld) where the Fourth Circuit affirmed a conviction for mail fraud where the defendant concealed the fact his checks were insufficient to

the victim who was issuing bills of lading in a series of transactions.

Williams v. United States, (9th Cir., 1960), 278 F.2d 535 (cited by trialcounsel at RC 41 line 15 to show where concealment type of misrepresentations have been upheld) where this Circuit upheld a conviction where the defendant was kiting checks between Hawaii, Seattle and Denver and the defendant was concealing the insufficiency of the checks.

Haid v. United States, (9th Cir., 1946), 157 F.2d 630, (cited by trial counsel at RC 41 line 16 to show where concealment type of misrepresentations have been upheld) where this Circuit upheld the conviction where the issue was impression testimony, the victim relied on the impression the defendant gave that he was an F.B.I. agent and the victim extended credit. The concealment that he was not an F.B.I. agent sustained the conviction.

Gregory v. United States, (5th Cir., 1958), 253 F.2d 104, (cited by trial counsel at RC 41 line 16 to show where concealment type of misrepresentations have been upheld) where a conviction was affirmed for a scheme by a railway clerk who obtained and used pre-dated cancelled envelopes to enter a national football contest after the games were played.

Kreuter v. United States, (5th Cir., 1955), 218 F.2d 532, (cited by trial counsel at RC 41 line 16 to show where concealment type of misrepresentations have been upheld) which affirmed a conviction and upheld the sufficiency of the Indictment which alleged the defendant deposited worthless checks and used the certificate of deposit to cash worthless checks, and which did not set out all the banks which were used.

Linden v. United States, (4th Cir., 1958), 254 F.2d 560, (cited by trial counsel at RC 41 line 16 to show where con-

cealment type of misrepresentations have been upheld) which affirmed a conviction where the defendant distributed solicitations for listing in a business directory and the solicitations were made to appear as telephone directory listings.

Silverman v. United States, (5th Cir., 1954), 213 F.2d 405, (cited by trial counsel at RC line 17 to show where concealment type of misrepresentations have been upheld) where a conviction was affirmed where a defendant used billings made to appear similar to telephone directory billings. The Fifth Circuit held that the scheme need not misrepresent any fact—all that's necessary is a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension and the use of the mails in its execution.

Cacy v. United States, (9th Cir., 1961), 298 F.2d 227, (cited by trial counsel at RC 41 line 18 as an example of an omission being an express misrepresentation) where this Court affirmed a conviction where the defendant's scheme was to sell an "exclusive" distributorship to different victims of the same machines, but using a different name for the machine.

It is respectfully submitted that "Water Plenty of Water" is a misrepresentation, for example, when the nearest available water well was eighteen miles to some of the sections, to give but one example.

Cited for the proposition by Appellant that the Indictment must allege someone was defrauded were the following cases and which held as follows:

Fushay v. United States, (8th Cir., 1933), 68 F.2d 205, (cited by trial counsel at RC 42 for the ruling in the Eighth Circuit) which held the criteria of civil fraud is applicable to criminal mail fraud; the Court held that an honest belief that

a corporation will make money is not justification for a misrepresentation.

United States v. Rabinowitz, (6th Cir., 1964), 327 F.2d 62 at page 76, (cited by trial counsel at RC 42 for the ruling in the Sixth Circuit) which held there must be proof of a person being defrauded. The Court helt it to be an element.

United States v. Baren, (2nd Cir., 1961), 305 F.2d 527, (cited by trial counsel at RC 42 for the ruling in the Second Circuit), where the Second Circuit held there must be proof someone was defrauded and admittedly without authority for the holding at page 528, but at page 533 the Court acknowledges the important element is the intent.

United States v. Brunet, (W. D. Wis., 1964), 227 F.Supp. 766, (cited by trial counsel at RC 42 for the rule in the Seventh Circuit) is that the Indictment must allege persons have been defrauded. (This was a mail order school which would get graduates Civil Service jobs, etc.)

Moser v. New York Life Insurance Co., (9th Cir., 1945), 151 F.2d 396, (cited by trial counsel at RC 42 as the rule in this Circuit for civil frauds) where this Court held that in a civil action for fraud there must be a false representation to an existing fact.

Schlaadt v. Zimmerman, (9th Cir., 1953), 206 F.2d 782, (cited by trial counsel at RC 42 as the rule in this Circuit for civil frauds) where this Circuit held in a civil fraud case that the fraud may not be predicated upon mere non-performance of a promise. (A widow married decedent upon the promise decedent would leave his estate to her children).

Kern Copters, Inc. v. Allied Helicopter Service, Inc., (9th Cir., 1960), 277 F.2d 308, (cited by trial counsel at RC 42

as the rule in this Circuit on civil frauds) where this Circuit held in a civil fraud action there was no fraud for non-disclosure of the removal of parts since this could have been easily ascertained.

The Third Circuit, *United States v. Kram,* supra (247 F.2d 830), and the Fifth Circuit, *Silverman v. United States,* supra, (213 F.2d 405), hold the same as the Ninth Circuit has held. *Lemon v. United States,* (9th Cir., 1960), 278 F.2d 369, at page 373, citing *Kreuter v. United States,* a Fifth Circuit case, supra, (218 F.2d 532), with approval. *Farrell v. United States,* (9th Cir., 1963), 321 F.2d 409, 419. The Ninth Circuit rule was conceded by trial counsel at RC 42. (The Lemon case holds the mail fraud statute is designed to protect the most gullible and naive as well as the worldly wise.) Also, please see *Dolack v. United States,* supra, and *Pereira v. United States,* (1953) 347 U. S. 1 at page 8, 74 S.Ct. 358, 98 L.Ed. 435.

It is respectfully submitted that the Indictment does not have to contain allegations that someone was defrauded.

Cited for the proposition that inadequate evidence was presented to the Grand Jury, since Exhibit F (as referred to by Appellant in the Opening Brief at page 52, but which is Government's Exhibit 50 in evidence) was presented to the Grand Jury and negated any evidence of fraud, are the following cases and which hold as follows:

Harrison v. United States, (6th Cir., 1912), 200 F. 662, (cited as 200 F.2d 662 by Appellant in his brief at page 52, but cited correctly by trial counsel at RC 43) which held at page 670 that although initially the advertising literature first contained a promise to refund if the merchandise was not as represented, and that after a conference with the Post Office authorities the defendant then made an absolute promise to re-

fund, the trial jury must still determine that the refund offer was made in good faith.

Jeffries v. Olsen, (S. D. Cal., 1954), 121 F.Supp. 463 at page 473, which held that in this case, a civil case to set aside a fraud order by the postal authorities, the plaintiff made an *unqualified* assurance of refund if not satisfied in his advertising.

(See Government's Exhibit 50, which was attached to trial counsel's Affidavit as Exhibit F, at RC 108 at page 112, or as quoted by trial counsel in his Memorandum when he was urging this point, starting at RC 43. At RC 46, line 22 it is stated in this "refund letter": "As a concrete indication that the company is certain you will be satisfied with your purchase, and in line with the company's continuing policy of bending over backwards to assure the satisfaction of each and every customer, please be advised that any customer who inspects Lake Mead City prior to September 1, 1963, and is then dissatisfied with his purchase for any reason whatsoever, will be given the right at that time to sign a request for a full refund at the Information Office on the property, and that all requests so signed at that time will be honored."

Gold v. United States, (8th Cir., 1929), 36 F.2d 16, held at page 32 that good faith is a complete defense which involved stock manipulations.

Walters v. United States, (9th Cir., 1958), 256 F.2d 840, where this Circuit reiterated the rule at page 842 that good faith, i.e., lack of intent to defraud, is a complete defense. This scheme involved a sale of insurance company stock through the mails containing the representation that a motel chain was interested in the insurance company defendant was forming.

The "refund letter" of Appellant was not an unqualified offer of refund and was not made until after Lustiger was in-

terviewed by Postal Inspector Doyle Marshall, to-wit: November 10, 1962 (RT 358 L 1-3).

It is respectfully submitted there was adequate evidence before the Grand Jury to return an Indictment.

Cited for the proposition that the Indictment and 18 U.S.C.A. 1341 do not contain an ascertainable standard of guilt, at page 53 of the Opening Brief are the following cases and which held as follows:

Giaccio v. Penn., (1966) 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (the only case not cited by trial counsel in his pre-trial Memorandum, which Appellant has used in this portion of the Opening Brief, page 50 through 53), which held unconstitutional a Pennsylvania statute which provided in a misdemeanor case where defendant is acquitted the defense shall be assessed costs and committed to jail for non-payment if the jury finds "some misconduct."

Winters v. New York, (1948) 333 U.S. 507, 68 S.Ct 665, 92 L.Ed. 840 (cited as *Winters v. United States* both by trial counsel at RC 47 and by Appellant at page 53), which held unconstitutional a New York statute as construed by the New York Court of Appeals, which prohibited distribution of magazines principally made up of criminal deeds of bloodshed or lust or crime since the statute failed to give adequate guidance.

Musser v. Utah, (1948) 333 U.S. 95, 68 S.Ct. 397, 92 L.Ed. 562, which held unconstitutional a Utah statute prohibiting a conspiracy to commit acts injurious to the public morals. (The Supreme Court reversed and sent back to the State Court to permit them to make this holding.)

Connally v. General Construction Co., (1926) 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322, held a state statute uncon-

stitutional for providing cumulative penalties for failing to pay "current rate of per diem wages in the locality".

United States v. Cohen Grocery Co., (1920) 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, which declared unconstitutional the Food Control Act of 1917 which declared it to be a crime for charging "unreasonable" rates in handling necessaries.

United States v. DeCadena, (N.D. Calif., 1952), 105 F.Supp. 202, at page 204, which held the terms of the Immigration Act for transporting aliens who had entered the country illegally when "he" knew the illegal entry had occurred within the last three years.

As was stated by trial counsel in his Memorandum at RC 48, the Supreme Court has not dealt with this aspect, but has in *Badders v. United States,* (1916) 240 U.S. 391, 60 L.Ed. 706, 36 S.Ct. 367, upheld the statute as constitutional.

It is respectfuly submitted that the Indictment does set an "ascertainable standard of guilt".

(In footnote 17 on page 53 of the Opening Brief, Appellant alleges the pre-trial publicity was flagrant and "can hardly be overemphasized, nor was it possible for that publicity to have not affected the trial judge". Citing *Giles v. Maryland,* (1967) —— U.S. ——, 87 S.Ct. ——, 17 L.Ed.2d 737, where the prosecutor took no steps to correct erroneous evidence, and *Sheppard v. Maxwell,* (1966) 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, which reversed for the carnival atmosphere at the trial. The footnote goes on to state the trial judge had arrived at an opinion prior to trial and had in mind the fact there was litigation over title to the land. These statements are not supported by the record, much less by fact. The Court was aware the title difficulties were stipulated to by the Gov-

ernment, as well as Lustiger, that they were not part of the fraud. (See Stipulation No. 10, paragraph 36, RC 228).

4. The Indictment did not contain duplicitous counts.

Appellant, at page 54 of the Opening Brief, asserts that each count failed to state an offense since the Indictment alleges Lustiger "placed or caused to place" the count letter and cities *Parr v. United States,* (1960) 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277, as authority for this point, i.e., Lustiger must have placed the letters in an authorized depository for mail himself. Futher, that the Indictment must be construed in a manner most favorable to the defendant, citing *Johnson v. United States,* (4th Cir., 1938), 95 F.2d 813, (a bank misapplication case, wilfully misapplied funds not sufficient).

Causing to be placed is sufficient, *Williams v. United States,* (9th Cir., 1960), 278 F.2d 535.

Appellant then goes on to allege each count is duplicitous, citing the following cases and which hold as follows:

Empire Oil and Gas Corporation v. United States, (9th Cir., 1943), 136 F.2d 868, which held at page 872 an Indictment under the Food and Drug Act that charged the commission of one offense in two ways was not duplicitous.

United States v. Martinez-Gonzales, (S.D. Calif., 1950), 89 F.Supp. 62, held that one count charging the smuggling of four aliens was duplicitous.

Appellant concedes that there are cases which hold that alleging both a scheme to defraud and a scheme to obtain money by false pretenses is not duplicitous. *United States v. Culver,* (D. My., 1963), 224 F.Supp. 419. See also *Silkworth v. United States,* (2nd Cir., 1926), 10 F.2d 711.

It is respectfully submitted each count is not duplicitous.

5. The Brady v. Maryland Motion was not denied and the Trial Court did not abuse its discretion in denying the Motion for Bill of Particulars.

Appellant cites *Brady v. Maryland,* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; *Barbee v. Warden, Maryland Penitentiary,* (4th Cir., 1964), 331 F.2d 842; *United States v. Wilkins,* (2nd Cir., 1964), 326 F.2d 135, for the authority that the prosecution must reveal evidence favorable to defendant. The Motion was not denied. The Order entered by the Trial Court on April 15, 1965 (RC 327) permitted Lustiger to renew at the close of the Government's case. These files (all the questionnaires and correspondence of Postal Inspector Marshall) were made available to Lustiger's trail counsel on June 5 and 6, 1965, and he inspected them. The list of Lustiger's witnesses was then filed on June 7, 1965 (RC 328). At the time of pre-sentence investigation by the Federal Probation Officer, he was given these files.

It is respectfully submitted *Brady v. Maryland* was more than compiled with.

Appellant asserts, at page 56, that it was prejudicial error to deny the Motion for a Bill of Particulars, citing the following cases and which held as follows:

Williams v. United States, (9th Cir., 1961) 289 F.2d 598 at page 601, this Circuit held it was not an abuse of discretion to deny a Motion for a Bill of Particulars unless the defendant is acutely surprised at trial, wherein this motion requested the geographic location of the acts charged by the Government.

Yeargain v. United States, 9th Cir., 1963), 314 F.2d 881 at page 882, this Circuit held the purpose of a Bill of Particulars

is to protect a defendant from double jeopardy and to prepare his defense, but the defendant is not entitled to know all the evidence but is entitled to know the Government's theory of the case.

United States v. Solomon, (S.D. Ill., 1960), 26 F.R.D. 397, held the defendant was entitled to the Bill of Particulars.

In this case, the Motion for Bill of Particulars was denied on April 15, 1965, (RC 327-328), after the first pre-trial conference was stipulated to by Lustiger personally and was held, and the first nineteen exhibits were marked and tentative stipulations presented to Lustiger and his counsel concerning the balance of Government's exhibits were shown to them. Thereafter, a pre-trial hearing was held on April 29, 1965, and the main exhibits of the Government were marked into evidence, i.e., Exhibits 20 through 54. On May 14, 1965, Stipulation No. 4 (RC 208), listing the Government's witnesses, was filed (RC 328).

This procedure afforded a full preview of the Government's case.

It is respectfully submitted there was no abuse of discretion by the Trial Court in the denial of the Motion for the Bill of Particulars.

6. The charges in the Indictment do not violate Appellant's First Amendment right to free speech.

Appellant argues at pages 57 and 58 that the entire brochure "must be examined and not just portions thereof taken out of context". Appellant cites five obscenity cases at pages 57 and 58 which hold portions must not be read out of context.

Appellant ignores Government's Exhibit 37 Series. Exhibit 37 listed the six different printings of the brochure and Exhibit 37a through f was a brochure from each printing.

In *In the Matter of Jackson, supra* (96 U.S. 727), the Supreme Court, in passing on the Federal statute prohibiting the sending of lottery matter through the mail, held at pages 736-737 that it was not a restriction on the freedom of speech but constituted a refusal by the Government of its facilities for the distribution of matters injurious to the public morals.

In *Commissioner of Internal Revenue v. Heininger,* (1943) 320 U.S. 467, 88 L.Ed. 171, 64 S.Ct. 249, the Supreme Court stated:

> "The single policy of these sections (the Postmaster's stop order statute) is to protect the public from fraudulent practices committed through the use of the mails. It is not their policy to impose personal punishment on violators; such punishment is provided by separate statute (citing 18 USCA §338, now §1341) and can be imposed only in a judicial proceeding in which the accused has the beneffit of constitutional and statutory safeguards appropriate to the trial for a crime."

The Supreme Court has thus recognized the power of Congress to restrict the use of postal facilities from fraudulent practices in a civil stop order.

It is respectfully submitted there is no deprivation of the Appellant's right to free speech.

7. There was sufficient evidence to find Appellant guilty beyond a reasonable doubt, there being an ascertainable standard of guilt under the offense charged, and proof of someone being defrauded is not an element of the offense.

Appellant cites as authority for the insufficiency of the evidence at pages 58 and 59 of the Opening Brief cases which were reversed for prejudicial comments in closing arguments:

Griffin v. California, (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 1206; and *Wilson v. United States,* (1893) 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650; or which held proof insufficient that defendant was not a citizen in a false claim of citizenship: *Colt v. United States,* (5th Cir., 1946), 158 F.2d 641; or that the defendant doesn't have to prove who stole coupons (conviction affirmed), *United States v. Bennett,* (2nd Cir., 1945), 152 F.2nd 342; or reversed on the Court's instruction on presumption of innocence, *Boatwright v. United States,* (8th Cir., 1939), 105 F.2d 737.

The last three cases cited at the top of page 59 are state cases.

Kaplan v. United States, (9th Cir., 1964), 329 F.2d 561, is in point which holds the test of circumstantial evidence is that reasonable minds can find the evidence excludes every hypothesis but that of guilt and evidence on appeal is construed in a light most favorable to the Government. Also *Mickelson v. United States,* (9th Cir., 1965), 346 F.2d 952 at 954.

The sufficiency of the evidence is discussed in the Government's Memorandum in Opposition to the Motion for Judgment of Acquittal which is at RC 306, which makes reference to the Memorandum in Support of the Motion for Judgment of Acquittal found at RC 243. (The Court will possibly feel this to be improper, but in view of Appellant's mere assertion of the insufficiency of the evidence, giving no discussion of it, the Government is unable to argue against points not given by Appellant.)

Appellant then argues there was no specific wrongful intent, citing *Morissette v. United States,* (1952) 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288, which involved a charge of receipt of stolen government property and no instruction on the knowl-

edge of defendant that it was stolen was given; and *Williams v. United States,* (9th Cir., 1960), 278 F.2d 55, cited earlier in this brief, which was a mail fraud case involving a check kiting scheme where the defendant made full restitution. This Court held intent was for the jury and they so found.

Appellant next asserts "the undeniable good faith exhibited by the Appellant", citing again *Gold v. United States,* (8th Cir., 1929), 36 F.2d 16, which holds good faith a complete defense, and *Walters v. United States,* (9th Cir., 1958), 256 F.2d 840, which holds good faith a complete defense and the government must establish beyond a reasonable doubt that the defendant intended to devise a scheme to defraud and to obtain money.

The recital of the evidence adduced at trial in the Statement of Facts establishes the lack of good faith. The refund letter, Government's Exhibit 50, was conditional upon a trip by the buyers who were scattered throughout the country and who would have had to expend in all probability the same amount of money as they had invested to get there.

Appellant then reasserts that the Indictment and the statute do not contain an ascertainable standard of guilty, citing *Giaccio v. Pennsylvania,* supra (382 U.S. 399), the Pennsylvania assessment of costs statute, and *Bouie v. Columbia,* (1963) 378 U.S. 347, 84 Sup.Ct. 1697, 12 L.Ed.2d 894, which reversed a conviction which was based on a retroactive application to a new construction of a criminal trespass statute (construed to cover those who refused to leave premises after having been given notice to leave).

Appellant then again asserts the Government failed to prove any one was defrauded, and cites again *United States v. Rabinowitz,* (6th Cir.), supra; *United States v. Baren,* (2nd Cir.), supra; *United States v. Brunet,* (Wis., 7th Cir.), supra;

and *United States v. Schwartz,* (N.D. Cal., 1915), 230 F. 537 (and not in 230 F.2d as cited by Appellant on page 60), which held Indictment must allege lots valueless.

Compare *Norton v. United States,* (9th Cir., 1937), 92 F.2d 753, which held the Government does not have to prove any one was misled; *United States v. Whitmore,* (S.D. Calif., 1951), 97 F.Supp. 733; and *United States v. New South Farm and Home Co.,* (1916) 241 U.S. 64 at p. 71, 36 S.Ct. 505.

8. The testimony of rancher James M. Smith's opinion as to the value of the land was not material, nor was the evidence of the advertising of adjacent land developments material, much less the advertising of land developments in other states, nor was the opinion of the former President of the Arizona League of Land Developers of the advertising of the Appellant admissible, nor was there error in admitting Government's Exhibit 42.

Appellant asserts the exclusion of evidence of James M. Smith as to his opinion of value was objected to by the Government as not material and sustained by the Trial Court on materiality and beyond the scope of direct (RT 219 L 11-25), and cites *Farrell v. United States,* (9th Cir., 1963), 321 F.2d 409, which was a mail fraud and a securities violation prosecution; and value is admittedly material in a securities case; *United States v. Bloom,* (2nd Cir., 1956), 237 F.2d 158, which held at page 164 that the Court's instruction that proof of value of diamonds was so slight as to be negligible constituted reversible error.

But in *United States v. New South Farm & Home Co.,* (1916) supra, at page 71, the Supreme Court stated:

". . . Mere puffing, indeed, might not be within its meaning (of this, however, no opinion need be ex-

pressed), that is, the mere exaggeration of the qualities which the article has; but when a proposed seller goes beyond that, assigns to the article qualities which it does not possess, does not simply magnify in opinion the advantages which it has but invents advantages and falsely asserts their existence, he transcends the limits of 'puffing' and engages in false representations and pretenses. *An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character or kind represented and hence does not serve the purpose. And when the pretenses or representations or promises which execute the deception and fraud are false they become the scheme or artifice which the statute denounces."*

(Emphasis added)

The Indictment did not allege the value of the land to be misrepresented; the objection made by the Government was on the basis the value of the land had not been raised (RT 219 L 19-23).

Appellant then argues at length the evidence, which was rejected, as to "standards of the industry" and related values.

Pictures of adjoining developments were admitted, but the advertising material was rejected. If these were admitted then the Government would have been entitled to show the truth or falsity in these advertising materials and the Court would then in effect be trying not one Indictment but a possible five or six mail fraud cases.

Cited in support of this contention at page 70 of the Opening Brief are the following: *United States v. Brandt,* (2nd Cir., 1952), 196 F.2d 653, which held evidence of other

charitable organizations hiring professional fund raisers should have been admitted; *United States v. Sprengl,* (3rd Cir., 1939), 103 F.2d 876, which was reversed for prejudicial reference to a co-defendant having pleaded guilty, the evidence was overwhelming; *Silkworth v. United States,* (2nd Cir., 1926), 10 F.2d 711, which held evidence of what partners of defendant were doing and what other firms that the defendant came into contact with were doing were admissible as circumstantial evidence of the defendant's knowledge of it.

But in *Hoffman v. United States,* (10th Cir., 1965), 353 F.2d 188, the Tenth Circuit held evidence of adjoining land developments was immaterial.

Appellant asserts the opinion of the former President of the Arizona League of Land Developers of the advertising material of Lustiger should have been admitted. A reading of his "opinion" of the advertising as quoted on page 70 shows that it is an opinion or conclusion as to the ultimate fact in issue in a field which a trier of fact does have first hand knowledge (i.e. — sanity and psychiatrists; wind turbulence and physicists; etc). Further, the Government could then show, if the opinion was admitted, what land development operations advertising was false, etc.

Appellant, at pages 70-71, cites the following cases:

United States v. West Coast News Co., (W. D. Mich., 1964), 228 F.Supp. 171, which involved a charge of transporting obscene material; the Court rejected the offer of other books because the defendant did not lay the foundation of showing similarity to the allegedly obscene material and the acceptance by the community of these books. (Standards of the community were material at that time, 1964, on determining obscene material).

Sheldon v. Moredal, (S.D. N.Y., 1939), 29 F. Supp. 729, which was a civil copyright suit and which held the testimony of an expert should be admitted as to the number of additional patrons because of the added attractions, the alleged copyrighted material. (Trier of fact would not have first hand knowledge).

United States v. Wood, (4th Cir., 1955), 226 F.2d 924, which involved the seizure of mis-branded drugs (allegedly for treatment of diabetes). The Trial Court rejected expert opinion offered by the Government since the opinion was based on the testing of animals and not human beings. The Fourth Circuit reversed and directed judgment be entered for the Government. (Trier of fact would not have first hand knowledge.)

Rolf v. Bird, (5th Cir., 1956), 239 F.2d 257, was a civil tort action and the Fifth Circuit held the expert should have been permitted to testify that the loading caused the loss of the vessel. (Trier of fact would not have first hand knowledge.)

Appellant further cites three state cases.

Appellant then contends that Government's Exhibit 42 should not have been admitted. It was the deed used by Lustiger. Trial counsel raised this in the post-trial motion (RC 301 L 18 — most of the points raised by Appellant, with the exception of free speech, — Appellant's VI, were raised in the pre-trial and post-trial motions by trial counsel).

If the deed were not offered, then Lustiger would contend the Government was inferring he didn't issue deeds. And if it were admitted, where's the harm or error?

Appellant contends that the relevancy of Exhibits B and B-1 was to show Palm Springs in a checker-board pattern and therefore checker-board patterns are no real impediment to

development of a thriving city, but the point is what was stated about the checker-board pattern in Lustiger's advertising material. The vicinity map (Exhibits 38, 38a and 38b) sent with the offer (Exhibits 40 through 40i), and the brochure (Exhibits 37a through f), to every person answering the ad, did not show this.

Appellant next argues that Exhibit D, the Government's brochure for developing tourism, should have been admitted to show what the Government encourages. But in what way can it be argued that the Govevrnment encourages showing pictures of items and represented as being within the boundaries of Lake Mead City, but not revealed as being on private land not owned by the developer? (Please see allegations contained in paragraph 8 of Count I of the Indictment at RC 10 and 11).

It is respectfully submitted the rejected evidence was properly rejected and Government's Exhibit 42 was properly admitted.

9. Appellant was afforded effective assistance of counsel at trial.

Appellant argues that trial counsel was incompetent at trial and refers to the Affidavit of Lustiger filed with the Motion for New Trial on January 6, 1967.

Lustiger contends:

"During the course of the trial I had many discussions with Mr. Madden about my testifying. I continually stated to Mr. Madden that I wished to testify. I was informed at that time by Mr. Madden's law partner, Mr. Shaper, that he was also of the opinion that I should testify and he so informed Mr. Madden. Mr. Madden stated he did

not think I should testify and naturally I was following the advice of my attorney when I did not testify. I believe I would have been able to convince the Court that I never at any time conceived of any scheme to defraud any person and that the material contained in the brochures sent out to the public was true to the best of my knowledge, information and belief and was represented to the public in good faith. I further believe that I would have been able to show to the Court that there were no dissatisfied customers or any complaints until after the Post Office Department representatives had lectured prospective Grand Jury witnesses/customers on the alleged frauds which I had committed before these witnesses testified before the Grand Jury and this Court."

Lustiger states his conclusion he would have convinced the Court of his good faith. Madden made the decision not to put him on. His partner, John S. Schaper, who is an able attorney, does not have the trial experience of Jack Madden. What could have happened to Lustiger on cross-examination? Why did he maintain business records in California, but ship his mailings to Juanita Tincher Ley by bus for mailing from Phoenix, and she in turn would mail them from Phoenix? (RT 80-81).

Why would he, having sent the checks for payment for recording in his National City Land Company office, have her deposit them in a Phoenix bank?

Was he trying to avoid registration with the California Real Estate Department?

Was he planning to move to Arizona, and had he moved to Arizona at the time of trial?

Was not Lustiger taken out on the land by Smith's fore-

man, Victor Christiansen, (RT 291 L 2-3) and shown what land Lustiger had requested to see that he had bought? (RT 256).

Lustiger contends in his Affidavit that Mrs. Van Valkenburg (at page 5, lines 5-6) would have impeached Christiansen's statement that his children didn't use the stock tank, and Madden refused to put her on. Christiansen stated they did use it five or six times (RT 291 L 2-3). Where is the impeachment?

Appellant, in the Motions, contended Madden was incompetent during trial, but in the brief concedes on page 72 in the second paragraph:

> "Necessarily, the record does not disclose the inadequacy of counsel. . . ."

Most of the research for Appellant's Opening Brief was done by trial counsel. The points trial counsel made with it are not included. Trial counsel, in his Memorandum in Support of the Motion for Judgment of Acquittal and for New Trial, wrote Appellant's Statement of Facts and paraphrasing of Indictment. (Compare Summary of Indictment, pages 7 to 13 of the Opening Brief to Madden's in the said Memorandum (RC 243 through 249), and compare the summary of the evidence in the Statement of Facts at pages 13 to 44 of the Opening Brief to Madden's at RC 249 through 280.)

The decision not to put a defendant on the stand is not grounds for declaring counsel incompetent.

The cases cited by Appellant involve a defendant, an attorney, who objected to appointed counsel who also represented co-defendants — *Glasser v. United States,* (1942) 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; trial counsel who didn't object

to admission of two confesssions, offered no testimony and didn't consult with defendant during trial — *Brubaker v. Dixon,* (9th Cir., 1962), 310 F.2d 30; trial counsel who represented other party in transactions with which the trial was involved, *Cord v. Smith,* (9th Cir., 1964), 338 F.2d 516; trial counsel who failed to interview Government's main witness prior to trial and who didn't cross-examine the witness effectively at trial, and which witness trial counsel represented civilly, *Tucker v. United States,* (9th Cir., 1956), 235 F.2d 238; an attorney who advised defendant not to answer questions before the grand jury which would incriminate that attorney's other clients, *Randazzo v. United States,* (5th Cir., 1964), 339 F.2d 79; trial counsel who represented victims of burglary from time to time and who didn't cross-examine those victims as witnesses in their identification of the accused, *United States ex rel, Miller v. Myers,* (E.D. Pa., 1966), 253 F.Supp. 55; trial counsel who interprets prosecution's closing argument to state his theory of case is wong, and the prosecution witnesses are reliable, *People v. Davis* (Cal., 1957), 48 Cal. 2d 241, 309 P.2d 201.

Errors in judgment (if there were any in this instant case) are not grounds for declaring counsel incompetent, *Lyons v. United States,* (9th Cir., 1963), 325 F.2d 370, cert. den. 377 U.S. 969, 84 S.Ct. 1650, 12 L.Ed. 2d 728.

As this Court stated in *Enriquez v. United States,* (9th Cir., 1964), 338 F.2d 165 at p. 167:

> "[3] What appear to be Cura's two principal points apply commonly to the validity of his conviction on both of the counts with which he was charged. These points are: (a) that he was not afforded the effective assistance of counsel in the preparation and trial of the case, and (b) that certain evidence highly prejudicial in nature was erroneously admitted. Neither point has merit.

"(a) Cura's counsel was retained . He had been an attorney for over twenty years. For the first five of them he was a member of the staff of the City Attorney of Los Angeles and had appeared in court almost daily prosecuting cases ;since that time he has contiuously carried on a successful private practice there, devoted almost exclusively to the defense of persons charged with the commission of criminal offenses. And the record in this case clearly discloses a vigorous defense conducted by capable counsel having a knowledgeable grasp of the facts and a keen desire for the welafre of his client. We fully agree with the able trial judge who, in appraising the quality of the trial judge who, in appraising the quality of the defense effort and the competence of counsel, declared '[t]he case was well tried* * *'.

"In reaching this conclusion we have not overlooked the fact that during the trial Cura expressed to the judge considerable dissatisfaction with his lawyer, and asked for (and was allowed) time to make a change. He did in fact then engage his present counsel ,but the latter declined to assume the defense at that stage of the proceedings and merely acted as associate counsel. Present counsel is highly critical of the efforts of his predecessor. Such an attitude, unfortunately, is not unusual in the legal profession; but as we observed not long ago in *Audett v. United States,* 265 F.2d 837, 844 (9th Cir. 1959), 'After all, there are few trial lawyers who, on examining the record of a trial critically, would not say that "they might have done better". But such surmises would not warrant this Court in branding the defense in this case as so inadequate as to amount to denial of the right tocounsel.'"

See also *Nelson v. People of the State of California,* (9th Cir., 1965), 346 F.2d 73 at p. 81, (a decision by counsel to

which defendant disagreed does not make that counsel's representation ineffective).

> ". . . Our reasons are that only counsel is competent to make such a decision, that counsel must be the manager of the law-suit, that if such decisions are to be made by the defendant, he is likely to do himself more harm than good, and that a contrary rule would seriously impair the constitutional guaranty of the right to counsel."

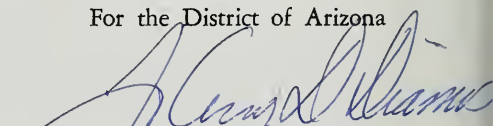
It is respectfully submitted Lustiger had effective assistance of counsel at trial, and really from that same counsel, assistance on this appeal.

VI.
CONCLUSION

It is respectfuly submitted that for all the foregoing reasons the judgmnt of conviction should be affirmed.

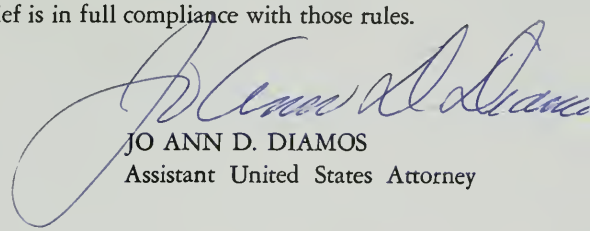
Respectfully submitted,

EDWARD E. DAVIS
United States Attorney
For the District of Arizona



JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



JO ANN D. DIAMOS
Assistant United States Attorney

Three copies of the within Brief of Appellee mailed this 29th day of May, 1967, to:

BURTON MARKS
Suite 217
8447 Wilshire Boulevard
Beverly Hills, California 90211
Attorney for Appellant